

In the United States District Court
Southern District of Texas
Houston Division

United States Courts
Southern District of Texas
FILED

AUG 26 2019

David J. Bradley, Clerk of Court

Antonio Benjamin,
Petitioner,

Vs.

Re: Case no. to be assigned
District Court Criminal Case
no. 4:17 CR 186-1
4:16 CR 186

United States of America,
Respondent.

Memorandum in Support of
28 U.S.C. §2255

Comes now Antonio Benjamin unrepresented/pro-se and the
Petitioner in the above captioned cause of action to set forth
facts which support his petition pursuant 28 U.S.C. §2255.

Benjamin submits the following:

Statement of the case: (facts)

On March 7, 2016 a female named Chelsey Thomas attempted
to enter a car operated by Benjamin. Because of a previous alter-
cation where Thomas assaulted Benjamin he told her he was not
going to allow her to enter his car just so she could hit him
again. Benjamin let his foot off the brake and just as the car
began to move Thomas grabbed for the rear door handle. When
the door handle flipped up her fingers got lodged. At this same
time the car was started in motion. The action propelled Thomas
just for a second and in falling her hand came free of the door.

This act was completely the fault of Thomas as Benjamin, sitting in the driver's seat, had no way of seeing her grab the handle or fall.

In an act of embarrassment and retaliation Thomas decided to make a complaint to Police. After she filed alleging an assault by vehicle Thomas added, "by the way--Benjamin is also pimping a minor from [Suchaand such] high school." The F.B.I. was called and after a brief interview with the alleged minor victim, filed a criminal complaint some 6 weeks later on April 21, 2016.

The complaint alleged the state crime that alleged the assault on Thomas. Since F.B.I. has no jurisdiction over an alleged simple assault case it is unclear why the F.B.I. investigated or included that state filing in his federal report.

The complaint alleged a violation of 18 U.S.C. §1591(a)(2) stating the means of force, fraud, coercion were used to cause a person under the age of 18 to engage in a commercial sex act and should be punished as provided in subsection (b).

The complaint filed, after F.B.I. investigation only alleged a single minor victim (MV1) and only one count alleging a single violation of sex trafficking. 18 U.S.C. §1591(a)(2).

On May 2, 2016 Benjamin was ordered detained and indictment was filed May 11, 2016. The indictment charged only one count of sex trafficking in violation of 18 U.S.C. §1591(a),(b)(1), and (2), and 2. Not two counts as incompetently stated in defense counsel's brief. On May 19, 2016 Benjamin pled not guilty in open court. Because he felt he never forced anybody to do anything he insisted to his counsel to plead him not guilty.

Mid July Benjamin retained new counsel who informed the AUSA that Benjamin would not accept a plea deal or sign a plea agreement. On November 16, 2016 the AUSA Superseded the indictment charging 2 fraudulent counts. Count two was now a new sex trafficking offense against a second minor (mv2). Same statute, 18 U.S.C. §1591(a), (b)(1) and (2), and (2). Count three charged a sex trafficking crime against an adult in violation of 1591 (a), (b)(1) and 2. No (b)(2) subsection is alleged in count three.

The AUSA only filed a superseding indictment when Benjamin refused to plead. On November 22, 2016 Benjamin again pleaded not guilty. On March 9, 2017 a third indictment was filed but merely made corrections to the SSI. Again, on March 16, 2017 Benjamin pleaded not guilty.

Counsel made attempts to get Benjamin to plead. But when the hearing was held on March 21, 2017 he still insisted he was not guilty of forcing anyone to do anything. The AUSA went on a tirade spewing threats to seek enhancements at sentencing if Benjamin failed to plead guilty. After the hearing the AUSA made a promise that the issues of force would be removed... that Benjamin is not pleading to force. On March 24, 2017 the AUSA had Benjamin sign the plea agreement and the court took his guilty plea on the terms promised by the AUSA.

A Presentence Report was prepared which stated allegations as facts. On September 15, 2017 Benjamin was given the draconian sentence of 30 years in federal prison.

Counsel for Benjamin filed an Ander's Brief on appeal which was granted on October 15, 2018.

The Law:

Title 18 of the United States Code, section 1591 reads:

(a) whoever knowingly-

- (1) in or affecting interstate or foreign commerce,
or within the special maritime and territorial
jurisdiction of the United States, recruits,
entices, harbors, transports, provides, obtains,
advertises, maintains, patronizes, or solicits
by any means a person; or
- (2) benefits, financially or by receiving anything
of value, from participation in a venture which
has engaged in an act described in violation
of paragraph (1),

knowing, or in reckless disregard of the fact, that means
of force, threats of force, fraud, coercion described in
subsection (e)(2), or any combination of such means will
be used to cause the person to engage in a commercial sex
act, or that the person has not attained the age of 18 years
and will be caused to engage in a commercial sex act, shall
be punished as provided in subsection (b). 18 U.S.C. §1591(a).
Subsection (b) prescribes different mandatory minimum sentences
for sex trafficking of a child under age 14, or , sex trafficking
by force:

(b) The punishment for an offense under subsection

(a) is - -

- (1) if the offense was effected by means of force,
threats of force, fraud, or coercion described
in subsection (e)(2), or by any combination

of such means, or if the person recruited, enticed, harbored, transported, provided, obtained, advertised, patronized, or solicited had not attained the age of 14 years at the time of such offense, by a fine under this title and imprisonment for any term of years not less than 15 or for life; or

- (2) if the offense was not so effected, and the person recruited....had attained the age of 14 years but had not attained the age of 18 years at the time of such offense, by a fine under this title and imprisonment for not less than 10 years or for life. 18 U.S.C. §1591(b).

Title 18 U.S.C. §2241(a) and U.S.S.G.2A3.1(b)(1).

18 U.S.C. §2241(a) pertains to "whoever...knowingly causes another person to engage in a sexual act (1) by using force against that other person; or (2) by threatening or placing that other person in fear that any person will be subjected to...serious bodily injury." 18 U.S.C. 2241(a)(1)-(2). U.S.S.G. §2A3.1(b)(1) provides for a four-level enhancement "if the offense involved conduct described above in 2241."

18 U.S.C. §2426(b)(1)(A) or (B) the term "prior sex offense conviction" means a conviction for an offense - under this chapter, 109A, 110, or section 1591, 2421, 2241, 2251.

U.S.S.G. §4B1.5(b)(1) n.4 two separate occasions defendant engaged in prohibited sexual conduct with a minor.

Benjamin seeks relief pursuant to 28 U.S.C. §2255. That section provides, as relevant here:

- (a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed, and the conviction obtained, in violation of the United States Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence, or constitutional error.

A petitioner who seeks to challenge a final conviction by collateral attack, can do so on constitutional or jurisdictional grounds. See *United States v. Shaïd*, 937 F.2d 228, 233 (5th Circuit 1991)(enbanc).

Herein, Benjamin raises claims of prosecutorial Misconduct, Ineffective Assistance of Counsel (IAC), as well as the lack of Personal and/or subject-matter Jurisdiction of the United States Government and/or United States District Court.

Timeliness:

As relevant here, Benjamin must file his §2255 motion within one year of his conviction becoming final. The United States Court of Appeals granted defense counsel's motion pursuant to *Anders vs. California*, thereby denying the relief requested in Benjamin's pro-se brief, on October 15, 2018.

The time to file for a Writ of Certiorari to the United States Supreme Court expired on January 14, 2019. The 2255 is therefore due by January 13, 2020.

This filing on August 1, 2019 is well within that timeframe and deemed timely.

Ineffective Assistance of Counsel

An ineffective assistance of counsel claim brought under §2255 is subject to the two-prong analysis articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), *United States v. Grammas*, 376 F.3d 433, 436 (5th Cir. 2004). To establish ineffective assistance, Benjamin will show: 1) that defense counsel's performance was deficient; and 2) that the deficient performance prejudiced him.

Benjamin will show that counsel's performance fell below an objective standard of reasonableness. See *United States v. Juarez*, 672 F.3d 381, 385 (5th Cir. 2012).

Prejudice will be established by showing there is a reasonable probability the results of the proceedings should have been different. *Strickland*, 466 U.S. at 694.

Benjamin was entitled to effective assistance of counsel at all stages of the criminal trial process, including the

sentencing phase. Benjamin only need show that counsel's ineffective assistance resulted in any additional incarceration. See *Ranson v. Johnson*, 126 F.3d 716, 721 (5th Cir. 1997); *Glover v. United States*, 531 U.S. 198, 203, 121 S.Ct. 696, 148 L.Ed.2d 604 (2001) (noting that "any amount of jail time has Sixth Amendment significance.").

A court may entertain and decide a §2255 motion without requiring the production of the prisoner at a hearing. Further, a district court may deny a §2255 motion without an evidentiary hearing "only if the motion, files, and records of the case conclusively show the prisoner is entitled to no relief." See *United States v. Bartholomew*, 974 F.2d 39, 41 (5th Cir. 1992).

The facts herein, supported by the record, however, do show that Benjamin, without a doubt, is entitled to the relief he seeks. There are no "bald assertions" nor any conclusory statements. All facts are strictly from the record, except where rebuttal is required. All matters of law derive solely from the writings of Fifth Circuit Court of Appeals justices and those of the Supreme Court.

Prosecutorial Misconduct

Federal Courts apply "a two-step analysis to charges of prosecutorial misconduct." See *United States v. Duffaut*, 314 F.3d 203, 210 (5th Cir. 2002). A court first decides whether the prosecutor's actions were improper and, if so, the court then determines whether the actions "prejudiced the defendant's substantive rights." *Id.* With respect to that latter determination,

the court asks whether the prosecutor's actions "so infected the trial with unfairness as to make the resulting conviction a denial of due process." See *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986).

"A trial is fundamentally unfair if there is a reasonable probability that the verdict might have been different had the trial been properly conducted." See *Foy v. Donnelly*, 959 F.2d 1307, 1317 (5th Cir. 1992). Therefore, "the touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." *Smith v. Phillips*, 455 U.S. 209, 219, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982).

In the instant case the subject of fairness is within the change of plea and its proceedings and not a trial issue.

Argument

Benjamin claims his Appellate counsel was ineffective for precisely many of the same reasons trial counsel was ineffective. Benjamin claims the AUSA is guilty of prosecutorial misconduct, retaliation, and reneging on her implied promises.

Because he is representing himself pro-se in this proceeding, Benjamin is entitled to the deference normally afforded to pro-se litigants. In pro-se cases the Court is required to construe allegations liberally, to ensure that a pro-se's claims are given fair and meaningful consideration, despite unfamiliarity with the law. See *Haines v. Kerner*, 404 U.S. 519, 520, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972).

In the instant 2255 Benjamin raises the following constit-

utional violations; 1) The AUSA maliciously superseded the indictment when he failed to enter into a plea deal; 2) Counsel was ineffective for not raising this issue; 3) There was insufficient evidence to prosecute counts two and three of the superseding indictment (SSI); 4) Counsel was ineffective for not raising this issue; 5) Benjamin's guilty plea was involuntary, unknowing, and unintelligent; 6) Counsel was ineffective for not withdrawing the plea; 7) The AUSA made threats at the first plea hearing to cause fear and intimidation; 8) Counsel was ineffective for sitting on his hands; 9) the AUSA's words at the plea hearings implied a different outcome at sentencing thereby inducing the guilty plea; 10) There was no basis or evidence to support sentencing enhancements offered at sentencing to allow for obstruction of justice, pattern of conduct, applying 2241(a); 11) the district court failed to calculate the guidelines; 12) the district court failed to mention, much less consider, the factors of 3553(a) thus making the guidelines mandatory.

#1 After Benjamin was indicted for one count of sex trafficking a minor he was approached by counsel who communicated a proposed plea agreement. Benjamin maintained his innocence and told counsel he wanted a trial.

The AUSA retaliated by filing a superseding indictment (SSI). The new indictment now accused Benjamin of sex trafficking a different minor in count two, and an adult female in count three.

Although a prosecutor may in the course of plea negotiations offer a defendant concessions relating to prosecution under

an existing indictment, she may not threaten a defendant with the consequence that more severe charges may be brought if he insists on going to trial.

The retaliation is evident in that all the information the AUSA put into the SSI was already known to her at the time she prepared the first original indictment to the Grand Jury. Second, there was no probable cause and there was insufficient evidence to charge the two extra counts of sex trafficking.

The F.B.I., by Special Agent Theo Williams, investigated Benjamin after a report from Houston, Texas Police Department. S.A. Williams filed a Federal Criminal Complaint on April 21, 2016. In that complaint the Agent only raises alleged criminal conduct against MV1. Nothing is mentioned about a MV2 or the original complainant to HPD, Chelsey Thomas being abused or trafficked.

The Presentence Report filed September 11, 2017 runs at length for five full pages of conduct/behavior all derived from the F.B.I. and HPD. See PSR pg 4 of 27 at #7: ("Information for this section of the report was obtained through review of the investigative files of the ... F.B.I and the HPD...").

A review of the PSR lists dates of investigations: 1) March 9, 2016 officers interviewed Chelsey Thomas; 2) On April 5, 2016 HPD officers interviewed MV1; 3) On April 6, 2016 "F.B.I. agents interviewed MV1 as part of the investigation"; 4) On April 11, 2016 agents interviewed MV2; 5) On April 19, 2016 Benjamin was arrested by HPD officers for assault; 6) beginning December 2014 and continuing through March 2016 Benjamin was involved in recruiting women and girls..; and, 7) On April 21,

2016 S.A. Williams filed the Criminal Complaint which was signed by U.S. Magistrate Nancy K. Johnson.

These facts show that the AUSA was aware of the investigative reports at the time she filed for indictment. The information in the superseding indictment was on the table of the AUSA at the time of the original indictment. There are no allegations in the SSI that was not available at the time of the original indictment.

The allegations in the SSI are without sufficient evidence. The AUSA merely filed the counts as a scare tactic to get Benjamin to plead out and in retaliation for not pleading beforehand.

Count two: (Sex Trafficking) ...Knowingly recruited, enticed ...any person...MV2...who was between 14 and 18 yrs. old... and benefitted financially...knowing in reckless disregard of the fact that: (1) means of force, threats of force, fraud, and coercion...would be used to cause MV2 to engage in commercial / sex act, and; (2) that MV2 had not attained 18 and would be caused to engage in a commercial sex act; in violation of 18 U.S.C. §1591(a), (b)(1) and (2)... In order to bring Count two the AUSA must possess probable cause that Benjamin has committed, and is probably guilty of, each element of the statute charged.

There is no evidence in the record to support the allegation that Benjamin used force, fraud or coercion to cause MV2 to engage in a commercial sex act. In fact, there is no evidence MV2 ever engaged in a commercial sex act or that she would ever be in a commercial sex act.

The AUSA states at the rearraignment of 03/24/2017 pg 20 lines 22 and 23: "she [MV2] also stated that he "solicited"

her to engage in commercial sex but she refused."

The F.B.I. report of 04/11/2016 states MV2 was asked but said no. Solicit means to ask or to request.

The evidence is plain. MV2 did not engage in commercial sex. Benjamin did not use force...he did not make any threats. The facts of the case are plain.

Count three involved an adult so therefore the statute alleged was 1591(b)(1) not (b)(2). The AUSA was required, then, to show Benjamin caused Chelsey Thomas to engage in commercial sex by means of force.

The investigative reports, and the AUSA freely admit, that C.T. was "involved" in prostitution of her own accord. That she and Benjamin were partners. Any assaultive behavior was that from a combative relationship ongoing, for over a year as the report reflects.

Because there was insufficient evidence to indict on counts 2 and 3 the SSI was vindictive and retaliatory. Because any so-called information the AUSA used to supersede the indictment was already on her desk at the time of the original indictment, the filing of the SSI is also shown to be retaliatory. Because of the AUSA's tirade of threats at the first rearraignment of 03/21/2016 (discussed more fully below) Benjamin has made a sufficient showing that the AUSA's filing of the SSI was in retaliation for Benjamin insisting he was not guilty of forcing anybody to do anything.

These facts also point to defense counsel's ineffectiveness. These facts were readily available to counsel had he only performed the most miniscule of investigations. Counsel's only interest

was for Benjamin to plead out beseeching him many times to just plead guilty.

Benjamin's guilty plea was unknowing, involuntary, and unintelligent. Therefore he has the absolute right to withdraw his guilty plea. First and Formost, counsel was ineffective in his advice to enter into the negotiations and advise Benjamin to plead guilty to counts one and two. As stated above, there was insufficient evidence to prove guilt beyond a reasonable doubt to an unanomous jury of 12. Especially in regards to count 2 and 3.

The plea was rendered involuntary where the AUSA made threats to induce the plea, then made promises which she reneged on at sentencing.

The facts in the record reflect the following:

The SSI filed by the AUSA charges violations of 18 U.S.C. §1591(a), (b)(1) and (b)(2) on counts one and two for alleged conduct against two different minors; 18 U.S.C. §1591(a) and (b)(1) for alleged conduct against an adult female Chelsey Thomas (CT). It is important to note the original indictment alleged the same statutory violations in the one count indictment.

The crux of the argument is that statutory difference in (b)(1) and (b)(2).

Subsection (b) prescribes different mandatory minimum sentence for sex trafficking a minor between the ages of fourteen and eighteen, sex trafficking a minor under age 14, or sex trafficking by force: (1) if the offense was effected by means of force, threats of force, fraud, or coercion described in subsection

(e)(2), or by any combination of such means, or if the person recruited, enticed, harbored, transported, provided, obtained, advertised, patronized, or solicited had not attained the age of 14 years at the time of such offense, by a fine under this title and imprisonment for any term of years not less than 15 or for life; or

(2) if the offense was not so effected [by force], and the person recruited, enticed, harbored, transported, provided, obtained, advertised, patronized, or solicited had attained the age of 14 years but had not attained the age of 18 years at the time of such offense, by a fine under this title and imprisonment for not less than 10 years or for life...

In short, the AUSA was charging (b)(2) for causing minor(s) to engage in commercial sex act, and (b)(1) for trafficking these minors through force, fraud, or coercion.

The government in the case *United States v. Keys*, 747 Fed. APPX.198 (5th Cir. 2018) maintained that subsections (b)(1) and (b)(2) enumerate two separate crimes which contain different elements. The court then declared; "In short, the history of the statute supports construing subsections (b)(1) and (b)(2) as distinct crimes that can be charged separately."

The United States Supreme Court has indicated that the failure to fulfill a promise contained in a plea agreement [or at the change of plea hearing] constitutes grounds for Benjamin to attack his conviction or sentence. See *Machibroda v. United States*, 368 U.S. 487, 82 S.Ct. 510, 7 L.Ed.2d 473 (1962); *Mempa v. Rhay*, 389 U.S. 128, 88 S.Ct. 254, 19 L.Ed.2d 336 (1967); *Blackledge v. Allison*, 52 L.Ed.2d 136 (1977).

These courts made rulings such as: "a guilty plea if induced by promises or threats...is void." "When a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled," "the critical question is whether the prisoner's allegations, when viewed against the record of the plea hearing...."

At a pretrial conference on March 17, 2017 defense counsel informs the judge - "maybe we can resolve the case if we can have until monday." Then on March 21, 2017 defense counsel has to inform the court that there is no deal as Benjamin had second thoughts. He then states he wants it on the record he advised benefits of a plea. He had told Benjamin a plea would move the mandatory minimum to 10 years from 15 years and he has a chance at less than 15. He also advised he'd get 3 points off for acceptance of responsibility and if he did not plead "he is going to get the potential for other enhancements..." He told Benjamin the government was willing to drop count three, which could hurt him in long run.

The Court states a plea bargain is out there you can accept and plead guilty or you could say no - do you want to plead guilty or not? Benjamin states, "I would like to go to trial." He wanted to tell the court "because I did not force anyone to do anything and there is nothing in the record which reflects force was used to get the girl(s) to go on a date on any given night."

But before he has a chance to continue, the AUSA lashed out with a tirade of threats... "I want it made 'very clear'

that if he goes to trial, that at sentencing, the United States will be seeking 'all of the possible enhancements' and 'all of this...[whatever "this" is?]."

She continues with: "there will be no excuse for his reason/choice to go to trial...once he is adjudicated guilty by a jury. that 's it...game over and the court will not consider his reasons to go to trial...it's game over...we will go forward with other charges such as the forced, fraud or coercion counts...and he'll be sentenced for these counts which will raise his offense level. Note: The Probation officer in his PSR states at #81 "had he been convicted of all 3 counts the Guideline Range would be the same."

The AUSA continues on with: "there will be no acceptance of responsibility. We'll consider obstruction and other enhancements which won't apply if he takes the plea deal."

The judge reinforces the statements/assurances of the AUSA by stating, "if you go to trial if the Jury finds you guilty [at least the court says "if"] you would face 'all of the consequences of being found guilty," this plea bargain gives you certain breaks [no enhancements] you have to plead guilty to get those breaks."

Before the next hearing took place on March 24, 2017 Counsel told Benjamin that the AUSA took the "force" issue "off the table." That if he pleads guilty to sex trafficking there would be no charge alleging force or fraud or coercion. He further told Benjamin the AUSA would not seek enhancements...no obstruction ...no sentence on the element in (b)(1) of force. He would be eligible for the minimum sentence of 10 years. Benjamin

agreed to sign a plea agreement to those effects and with that agreement/promise of the AUSA he would go against his better judgment and plead guilty.

At this change of plea hearing the AUSA stated she wants to make it very very clear on the record "and for purposes of sentencing" that the provision Benjamin is pleading to is "NOT" the provision that contemplates force, fraud or coercion... She states again she wants it to be very clear he is not pleading to any force, fraud or coercion. Defense counsel then tells the court "that is part of the considerations in the plea deal that they [AUSA] did that."

The Court then describes the elements of 1591(a) and leaves out all mention of force, fraud, or coercion. There was no mention of Chelsey Thomas or elements or conduct alleged in count 3.

This record is free from any obscurity or ambiguity as to Benjamin's understanding in exactly what the AUSA's promises and assurances were. If Benjamin would cease in his persistence on going to trial and plead only to sex trafficking of the minors he would be considered for a sentence of 10 years. Also there would be no issues of force or obstruction or other enhancements at sentencing. He would also get 3 points taken off his offense level for accepting responsibility for the conduct the AUSA alleged.

The Plea Agreement signed on the same day as the change of plea hearing March 24, 2017 contracts the following:

- 1) Benjamin will plead to violating statute 18

U.S.C. §1591(a) and (b)(2). The charge of (b)(1) [the force issues] was in the indictment and was removed from the plea.

- 2) The statutory punishment range is no less than 10. (No less than 15 was removed from the plea).
- 3) the facts establishing guilt are now minus any mention of force, violence or coercion. Stated MV2 stripped in clubs and said no to prostituting. There is a statement where MV2 said there would be consequences but no mention of what "consequences" entails. There was also mention of being punched in the chest but no mention that this punch was in connection to any consequences or if it was done in horseplay. There was mention MV2 was being groomed...says who? No evidentiary support just conclusory statements. There is no mention of MV1 or MV2 witnessing any violence, no mention of Chelsey Thomas and that combative partnership (count three).

In short, Benjamin signed a plea agreement negotiated on the condition that Benjamin admits no allegation of force. He pled guilty on the premise and on the promise/assurance that he is not admitting to force.

The AUSA's own words at the change of plea hearing made it "very, very clear" that she is not alleging force and Benjamin is not admitting force.

In determining whether an agreement's terms were breached the court must apply an objective standard and must decide whether the government's actions are inconsistent with what the defendant reasonably understood when he entered his guilty plea. See *United States v. Copeland*, 381 F.3d 1101 (11th Cir. 2004).

The written agreement should be viewed against the background of the negotiations and should not be interpreted to directly contradict an oral understanding.

The AUSA breached the oral assurances at the change of plea hearing when she filed her statement to Probation regarding the offense of conviction. She again violated the agreement at sentencing.

At the plea hearing the AUSA stated enhancements would apply at sentencing "if he did not plead." At sentencing the AUSA was fully prepared to argue for every enhancement she could dream up. Defense Counsel even stated, "all of these enhancements are piling up."

When the AUSA is asked to speak she immediately begins talking of violence and force so she can persuade the court to grant the enhancements she promised not to ask for.

She begins on pg. 12 of the transcript: "as to the violence... you can't separate that violence and say it's domestic and don't apply when the minors witnessed the violence and that influenced her being manipulated. This woman was dragged by a car, she was choked twice and this was caused by Benjamin..."

So right away she argues for the court to see the violence and force Benjamin "allegedly" applied. This violates her agreement. Also none of what she implies was ever proven in court to a jury and none of it admitted. There was no witness to testify to these allegations, no cross examinations. These were words not taken word for word from a police report but an adult female filed in a fit of anger.

Next the AUSA states Benjamin is a "repeat and dangerous"

sex offender because MV1 prostituted more than one time in the month of March. MV1 was 'forced' to engage in commercial sex repeatedly. If that is true then why drop the statute she charged in the indictment alleging force in (b)(1)? Again she has violated the plea deal to drop the "force" allegation.

Next she says Benjamin effectively "raped" MV2. Again, only an allegation in a police report. No convictions, no findings, yet the AUSA characterizes Benjamin guilty of conduct he was never charged with, never had put to a jury, never pleaded guilty to. So the AUSA states the allegation qualifies him as "absolutely a repeat and dangerous sex offender pg. 13 lines 17 & 18." Next she tries to lay blame on probation by saying, "we stand by probation's responses..." But "probation's response" are merely a mirror image of the AUSA's offense conduct she wanted considered at sentencing. She stated, "these enhancements apply."

With no proof of anything the Court denies defense counsel's objection. There wasn't even a preponderance of evidence. The BOP has the most lax standard in the world of "some evidence" and this court did not even pass that muster. The Court merely acquiesced the AUSA as they do 98% of the time.

Defense counsel next objects to the application of U.S.C. §2241 being applied.

The AUSA directly interjects blaming the PSR again, pg. 15 lines 23-25, yet they are her words from the PSR. She states he did engage in a pattern of behavior that constitutes enhancements of 2A1.3. She states again that abuse caused MV1 to do commercial

sex. "She was forced to do that." "Physically forced." "Forced psychologically." "Fear of physical reprisal." "Which he visited upon her and done to others." "He forced her to have sex with him." "that is force." "he is going to have to answer for that."

The Court again overrules the objection with no evidence, only conclusory allegations, no witness, no corroboration. The AUSA exaggerated and even worded the police reports in a way that one thought they were facts already proven.

Defense Counsel failed to alert the court to any of this or object to the AUSA's breach of the plea deal.

Benjamin argues that his sentence increase violated the Sixth Amendment because it was based on false facts relating to force issues that the Government did not prove to a jury, and argued for in breach of the plea deal, and he did not admit.

The government can breach a plea deal by making statements regarding the PSI that are inconsistent with the plea deal. see United States vs. Condon. 2010 U.S. Appx. LEXIS 7472 (11th Cir.).

The government is bound by any material promise it makes to a defendant as part of a plea agreement that induces the defendant to plead guilty. United States v. Taylor, 77 F.3d 368, 370 (11th Cir. 1996). Whether a plea deal is violated is determined according to the defendant's reasonable understanding when he entered the plea. See United States v. Horsfall, 552 F.3d 1275, 1281 (11th Cir. 2008). See also United States v. Reeves, 255 F.3d 208, 210 (5th Cir. 2001). Accord: United States v. Saling, 205 F.3d 764, 766 (5th Cir. 2000).

Where the government breaches a plea agreement the defendant has the option to either withdraw his plea, or to enforce specific performance by having resentencing before a different judge. *Saling*, 205 F.3d at 767-68 (5th Cir. 2000); *United States v. Palomo*, 998 F.2d 253, 256 (5th Cir. 1993). See also *Santobello v. New York*, 404 U.S. 257, 92 S.Ct. 495, 499, 30 L.Ed.2d 427 (1971). Here, Benjamin has consistently denied force and requires specific performance...to be sentenced without enhancements.

The AUSA has without a doubt breached the plea deal which took place in light of Benjamin's insistence on going to trial to challenge any accusation of force. The record could not be more clear and plain.

The District Court granted enhancements with no basis in fact and no evidentiary support. The government did not call any witnesses and merely relied on statements from a police report. Probation relied on these same reports and the words of the AUSA.

The Court even states the "evidence" she relied on was: pg. 38 lines 13 - "The investigation revealed that..." The Court took all of its 'Facts' from an investigative report. Benjamin acknowledges reliable hearsay may be used in the determination of a sentence. However, that evidence relied upon by the Court lacks the minimal indicia of reliability required by the Sentencing Guidelines. These enhancements were based solely on unsworn allegations made by Benjamin's disgruntled girlfriend and two minors. There was no sworn affidavits in support of their allegations. Neither Probation nor AUSA interviewed

any witnesses which is admitted in the record. Therefore, neither had the opportunity to observe any demeanor to form an opinion on veracity. The record, moreover, contains no evidence that corroborates the account given by the preparing officer. The girlfriends' unsworn allegations and those of the minors, therefore, stand as the only evidence of violence or force upon which any enhancement could be based. The Sentencing Guidelines do not require a high threshold of reliability, but more is required than was presented to this court. Furthermore, no police reports, no FBI reports, not even a summary of any reports was entered into the record. Therefore no opportunity existed to present a challenge.

The District Court failed to correctly calculate the Guidelines or point any aspect of sentencing to the factors enumerated in 18 U.S.C. §3553(a). There was no basis for enhancements.

U.S.S.G. §2A3.1, Application Note 1 provides, in relevant part:

"the means set forth in 18 U.S.C. §2241(a) or (b)" are: by using force against the victim; by threatening or placing the victim in fear that any person will be subject to death, serious bodily injury, or kidnapping; by rendering the victim unconscious; or by administering force or threat of force....

Besides the fact that the AUSA promised to remove the "force" accusations the only evidence in the record arguably connoting use of force at the time of the offense was police and FBI reports where complainants told of altercations, consequences and getting a hand stuck in a door handle...nowhere do any

of the reports tie in any violence or force with being made to prostitute. In fact the only time MV1 stated she felt forced to have to do prostitution was when she mentioned she was kicked out of her home and had to support herself in some manner so she forced herself into prostitution out of need to survive. Not need to perform at the direction of Benjamin.

There is nothing in the record that shows Benjamin on purpose laced MV2's cigarette with a drug to render her unconscious so he can have sex with her. That's just the AUSA's sayso that occurred. The guidelines contemplate some evidence of the use of force as an affirmative matter. Here, all we have is guesswork and assumption.

As for Obstruction of Justice the Court never made any mention of this enhancement. Therefore, there was no findings and this enhancement must be stricken.

Likewise with a pattern of activity or being a repeat and dangerous sex offender, the Court made no findings. There is nothing in the record to support such an enhancement.

The court begins the sentencing proceedings not with a mention of the Guidelines or statutory law regarding imprisonment, but with asking defense his objections to the PSR.

The first time the Court alludes to the Guidelines is on page 26 where she states she adopts the PSR as her own both as to the findings of fact and the application of the guidelines as to those "facts." She finds a total offense level of 42 and criminal history category of III for a guideline range of 360 to life.

Defense Counsel states many times - this is horrific punishment...it is severe, very severe, it is severe, very Draconian. The Court sentenced Benjamin to "30" years in a federal prison.

District Courts must "begin" their sentencing analysis with the Guidelines in effect at the time of the offense and use them to calculate the sentencing range correctly. Failure to do so results in a procedurally unreasonable sentence. See *Gall v. United States*, 552 U.S. 38, 41, 128 S.Ct. 586, 591, 169 L.Ed.2d 445 (2007). In reviewing the procedural reasonableness of a sentence, the circuit court of appeals for the Fifth Circuit considers whether the district court committed any significant procedural error, such as failing to calculate or improperly calculating the advisory guidelines range, treating the guidelines as mandatory, failing to consider the 18 U.S.C. § 3553(a) sentencing factors, selecting a sentence based on clearly erroneous facts, or failing to explain adequately the chosen sentence. *Gall*, 552 U.S. at 51. 128 S.Ct. at 597.

The Guidelines are just one factor among many to be balanced against six other statutory sentencing factors. 18 U.S.C. §3553(a). District Courts commit reversible error if they treat the guidelines as mandatory, and they cannot presume that a sentence within the applicable Guidelines range is reasonable. See *United States vs. Matchette*, 837 F.3d 1118 (11th Cir. 2016).

The sentencing Court never mentioned 3553 one time. It never so much as implied any of the 3553(a) factors were considered. The only mention of 3553 in the PSR is the very last paragraph where Probation states he knows of nothing under 3553 that would warrant a sentence outside the guidelines. This, too, is insufficient.

The Guidelines were given without pointing to which "facts" supported which enhancement, what evidence passed the preponderance standard or even that preponderance was the standard.

The sentence was procedurally and substantively unreasonable.
The sentence must therefore be vacated.

For the reasons stated above Benjamin first would request his sentence be vacated and that he be remanded to a different District Court Judge with instructions that Benjamin be sentenced without any reference to the issue of force...including 2241 of Title 18, to compel specific performance of the AUSA promises and assurances during the plea stages.

These same enhancements fail also under an abuse of discretion standard at the sentencing hearing.

Benjamin would also argue his criminal history score over represents the seriousness of his past offenses.

Even where the criminal history score would stand Benjamin's offense level would be 27 after a 3 point reduction for the promised Acceptance of Responsibility by the AUSA. TOL of 27 with a criminal history score of III gives a guideline range of 87-108 months. Because there is a ten year minimum, that would become the correctly calculated range. Benjamin requests a sentence of 120 months.

Dated: August 9, 2019

Respectfully Submitted,


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cc) File